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No. 90-900
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

THE RECTOR, WARDENS AND MEMBERS OF THE VESTRY OF ST. BARTHOLOMEW'S CHURCH,

Petitioners,

-against-

THE CITY OF NEW YORK AND THE LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

This Court upheld the constitutionality of the New York City Landmarks Law in Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978). Under the Landmarks Law, when a building is designated as a landmark, a tax exempt owner may obtain hardship relief if it shows that it can no longer use its historic building. The Courts below determined that petitioner could house all its desired activities in the Community House and, therefore, did not need to demolish this landmark structure.

1. Does the First Amendment require that all buildings owned by religious institutions be exempted from the Landmarks Law?

2. Does the denial of petitioner's application for hardship relief violate the Fifth Amendment?

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STATEMENT OF THE CASE

The New York City Landmarks Preservation Commission ("the Commission") designated the exterior of St. Bartholomew's Church and Community House and its

terraces and gardens as a landmark in March 1967. The Commission found that "St. Bartholomew's Church and Community House have a special character, special historical and aesthetic interest and value as part of the development, heritage and cultural aspects of New York City" (A-5).[1] See New York City Administrative Code ("Admin. Code") §§25-302[n], 25-303.

A special proceeding to review the Commission's designation is readily available in the New York Courts for owners who contend that their property is not of landmark quality. See Society for Ethical Culture v. Spatt, 51 N.Y.2d 449, 415 N.E.2d 922 (1980). The Church never

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[1] References to the Appendix to the petition are cited as (A-_). References to the Joint Appendix in the Court of Appeals are cited as (JA_). References to the Appendix in the District Court are to the volume number followed by the page number, i.e. (10/541).

challenged any part of the designation in court (A-28).

The Landmarks Preservation Commission is not empowered to designate an interior space used as a place of religious worship. Admin. Code §25-303[a](2). A building designated as a landmark may not be altered or demolished without obtaining a permit from the Commission. Admin. Code §25-305(a)(1).

In December 1983, petitioner filed the first of two applications for permission to demolish the Community House and replace it with an office tower. Petitioner first proposed building a 59 story office tower (A-6). After the Commission unanimously denied the application, petitioner submitted revised plans for a 47 story office tower. Most of the building would be leased as commercial space while the basement would be used as a new Community House (JA-15, 288). The Commission unanimously rejected

the new design because it was inappropriate to the landmark (JA-606).

Petitioner then applied for permission to build the 47 story office tower in place of the Community House on the ground of relief from hardship (A-6). As a tax exempt property owner, petitioner could obtain hardship relief "where maintenance of the landmark either physically or financially prevents or seriously interferes with carrying out the [owner's] charitable purpose." Society for Ethical Culture v. Spatt, 51 N.Y.2d 449, 455, 415 N.E.2d 922, 925 (1980).

The Commission considered the application at a series of public hearings and public executive sessions (A-6-7). The Commission unanimously determined that petitioner did not meet the standard for hardship relief because the evidence showed that the Community House had sufficient space for all the functions petitioner wanted

to devote it to, the Community House could easily be reconfigured to make the changes petitioner wanted, it made economic sense to repair the Community House and petitioner could afford to make any necessary repairs (JA-820-73).

Petitioner then brought this proceeding alleging, inter alia, that the Landmarks Law violated its rights under the First and Fifth Amendments (A-7). The District Court determined that the Landmarks Law was constitutional on its face and, after a bench trial limited to the 23 volume record of proceedings before the Commission, held that the Landmarks Law was constitutional as applied. The Court of Appeals affirmed.

1. The District Court Opinion

The District Court found the Landmarks Law facially constitutional as against the First Amendment challenge because it did not coerce religious beliefs or penalize religious activity (A-32). The Court also held that

the Landmarks Law and Commission proceedings comport with due process because property owners receive adequate notice and "the opportunity for an extensive hearing" (A-35).

The Court rejected the Church's taking claim, relying on Penn Central Transp. Co. v. New York City, 438 U.S. 104, 123-24 (1978). Because the Community House is not a profit making property, the Court determined that petitioner could prove a taking had occurred "where the landmark designation would prevent or seriously interfere with the carrying out of the charitable purpose of the institution" (A-39-40).

Reviewing the record, the District Court found that landmark designation did not interfere with petitioner's purpose in using the Community House. The Church argued that the Community House was too small to support Church activities. The

Court found these claims "incorrect" and "unsupported by any evidence" (A-42, 43). The Church claimed it would cost $11 million to repair the Community House. The Court completely rejected the report the Church relied on finding "it is clear ... that their object was not to determine what repairs were truly necessary or required, but to maximize the amount of work and the cost of that work." (A-48). The Court found that repairs would cost approximately three million dollars and that this was an objectively reasonable amount to spend given the market value of the property (A-52, 56).

The Court rejected the Church's claim that the landmark designation had diminished the value of the property by 80% by finding that the property's transferable development rights were a valuable property interest that could be exploited by the Church (A-55-56). Finally, the Court rejected the Church's claims that it could not afford to make the

repairs. The Court found that the work did not have to be done all at once as the Church had claimed, that the Church had operated at close to break even point without distinguishing capital and operating expenses for the previous ten years and while spending over $1.6 million on its development plans and the Church had not explored either selling its valuable air rights or mounting a fund raising campaign to augment its $12.5 million endowment (A-52-56).

2. The Court of Appeals Opinion

The Court of Appeals, in an opinion by Judge Winter, rejected petitioner's argument that because it was a religious institution, it had a First Amendment right to exemption from the the Landmarks Law in order to raise money. Relying on this Court's decisions interpreting the Free Exercise Clause, the Court of Appeals held that the Church's free exercise claim depended on the

nature of the Landmarks Law, not solely on the law's effect on the Church (A-11): "The critical distinction is ... between a neutral, generally applicable law that happens to bear on religiously motivated action, and a regulation that restricts certain conduct because it is religiously motivated."

Explaining that this Court, in Penn Central, 438 U.S. at 132, had already rejected petitioner's argument that the Landmarks Law was not a general law because it regulated individual properties and noting the similarity between zoning and the Landmarks Law (A-12-13), the Court of Appeals held that the Landmarks Law "is a facially neutral regulation of general applicability within the meaning of Supreme Court decisions" (A-11).

Because the Landmarks Law is a neutral law, the Court rejected petitioner's argument that the law was rendered invalid if it

diminished the Church's ability to raise money. Relying on Jimmy Swaggart Ministries v. Board of Equalization, _ U.S. _, 110 S.Ct. 688 (1990), Hernandez v. Commissioner, _ U.S. _, 109 S.Ct. 2136 (1989), and Lyng v. Northwest Cemetery Protective Ass'n, 485 U.S. 439 (1988), the Court explained that "no First Amendment violation has occurred absent a showing of discriminatory motive, coercion in religious practice or the Church's inability to carry out its religious mission in its existing facilities." (A-14).

The Court also rejected an excessive entanglement claim. It reasoned, relying on Jimmy Swaggart Ministries, 110 S.Ct. at 697-99, that Commission proceedings were constitutional because they are limited to financial and architectural matters and only occur if a church applies for permission to alter a landmarked building (A-14).

On the takings claim, the Court of

Appeals found that this case was indistinguishable from Penn Central, 438 U.S. 104 (1978). The Court stated (A-16):

> In that case, the Landmarks Law diminished the opportunity for Penn Central to earn what might have been substantial amounts by preventing it from building a skyscraper atop the Terminal. Here it prevents a similar development by the Church -- one that, in contrast to the proposal to build an office tower over Grand Central Terminal, would involve the razing of a landmarked building -- at least so long as the Church is able to continue its present activities in the existing buildings.

Accordingly, the Court found no taking had occurred.

The Court of Appeals affirmed all the District Court's factual findings. The Court rejected the Church's claim that the Community House had no space for desired activities (A-19):

> Fatal, however, to the Church's claim is the absence of any showing that the space deficiency in the Community House cannot be remedied by a reconfiguration or expansion that is consistent with the purposes of the Landmarks

> Law.... Certainly the intermediate option of limited expansion must be thoroughly explored before jumping to replacement with a forty-seven story office building.

The Court noted that the Church on appeal had abandoned its previous claim that repairs would cost $11 million and now argued that repairs would cost $4.5 million (A-20). The Court found that even if the Church's claims were accurate, the Church offered no evidence to show "that it is unable to meet this expense" (A-21). The Court also affirmed the District Court's finding that the transferable development rights were valuable (A-22). Accordingly, the Court of Appeals affirmed the District Court's holding that petitioner did not prove that its constitutional rights were violated.

REASONS FOR DENYING THE WRIT

This Court should only review this case if it would find that the Constitution exempts all properties owned by religious organizations from land use regulation. If

such properties are properly subject to regulation, then the factual findings of the lower courts and the Landmarks Commission that petitioner can continue to house its activities in the landmark Community House require the conclusion that there has been no constitutional violation. The courts below specifically rejected petitioner's claim that designation of the Community House as a landmark has forced it to maintain a building "ill-suited to [its] needs and costly to maintain and repair" (Petition at 7). The District Court found those claims "incorrect" and "unsupported by the evidence" (A-42, 43, 48, 52) and the Court of Appeals affirmed the findings of fact (A-18-22).[2]

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[2] Nor is this a case where designation of a property as a landmark destroyed 80% of the property's value (Petition at i). That figure is based on the assumption that the property cannot be developed. Both Courts below found as fact that this assumption is untrue (A-22, 55-56). See infra at Point Two.

The standard under the Landmarks Law for grant of hardship relief ensures that religious organizations can obtain relief from designation of their property as a landmark if they can no longer use their property. In holding that this standard comports with the Constitution, the lower courts followed this Court's settled First and Fifth Amendment jurisprudence.

POINT ONE

THE COURT OF APPEALS PROPERLY FOLLOWED THIS COURT'S DECISIONS IN HOLDING THAT IT IS CONSTITUTIONAL TO APPLY THE LANDMARKS LAW, A NEUTRAL LAND USE REGULATION, TO PROPERTY OWNED BY A CHURCH.

This Court has already held that a neutral regulation does not impose a substantial burden on the exercise of First Amendment rights although it diminishes the money available to a religious organization. Jimmy Swaggart Ministries v. Board of Equalization, __ U.S. __, 110 S.Ct. 688, 696

(1990); Hernandez v. Commissioner, __ U.S.__, 109 S.Ct. 2136, 2149 (1989). In Swaggart this Court unanimously upheld a tax on sales of religious items by the Jimmy Swaggart Ministries, although it cut into the amount of money the Ministries could spend on religious purposes. This Court explained: "At bottom, though we do not doubt the economic cost to appellant of complying with a generally applicable sales and use tax, such a tax is no different from other generally applicable laws and regulations -- such as health and safety regulations -- to which appellant must adhere." 110 S.Ct. at 696.

Because generally applicable laws that do not regulate religious beliefs do not "burden the claimant's freedom to exercise religious rights," Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 303 (1985), they do not require justification by reference to a compelling

state interest. Hernandez, 109 S.Ct. at 2148; Sherbert v. Verner, 374 U.S. 398, 403 (1963). Thus, even before its decision in Employment Division v. Smith, this Court had already rejected the argument advanced by petitioner and its amici: that there is a First Amendment right to maximize a religious organization's income because the money would be spent for religious purposes.[3] In Smith this Court reaffirmed its view that general laws that do not coerce

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[3] Petitioner relies on a recent decision of the Washington State Supreme Court, First Covenant Church of Seattle v. City of Seattle, 114 Wash.2d 392, 787 P.2d 1352 (1990), which struck down a landmarks preservation law as applied to a church. The majority neither cited nor relied on this Court's decisions in Smith, Swaggart and Hernandez, and therefore failed to determine whether a law of general application imposed a substantial burden. The concurring Judges noted this deficiency and suggested that a landmark designation should be struck down only if the Church cannot use the landmark building for its religious purposes. As the Court of Appeals held, New York City's Landmarks Law satisfies this test.

religious beliefs are valid although they may forbid conduct associated with religious beliefs. Employment Division v. Smith, 110 S.Ct. at 1600. United States v. Lee, 455 U.S. 252 (1982); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

The Landmarks Law is a facially neutral land use regulation. This Court has stated that the law "embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city...." Penn Central Transp. Co. v. New York City, 438 U.S. 104, 132 (1978). Thus, this Court has previously rejected the argument that the Landmarks Law is not a generally applicable law because not all properties are important enough to be landmarked. Penn Central, 438 U.S. at 132.

The law does not regulate religious beliefs. As the Court of Appeals summarized

the claims made before it (A-11): "No one seriously contends that the Landmarks Law interferes with substantive religious views." While petitioner argues that a disproportionate number of religious buildings have been landmarked, the Court of Appeals rejected the claim of discrimination as factually unsupported. It found "no evidence of an intent to discriminate against, or impinge on, religious belief in the designation of landmark sites" (JA-12).

The Landmarks Law regulates religious institutions in their secular guise as property owners. Like a zoning law,[4] the Landmarks Law restricts a property owner's

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[4] The Circuit Courts of Appeal have held that zoning laws may be applied to properties owned by religious institutions. Grosz v. City of Miami Beach, 721 F.2d 729 (11th Cir.), cert. denied, 469 U.S. 827 (1983); Lakewood Ohio Congregation of Jehova's Witnesses, 699 F.2d 303 (6th Cir.), cert. denied, 464 U.S. 815 (1983).

ability to devote its property to the most lucrative possible use. This effect is constitutional when a secular property owner's property is landmarked. Penn Central, 438 U.S. 104. The First Amendment does not require a different outcome when the property is owned by a religious institution. See Swaggart, 110 S.Ct. at 696; Hernandez, 109 S.Ct. at 2149.

The New York hardship standard ensures that the Landmarks Law cannot have so onerous an economic impact that it "might effectively choke off an adherent's religious practices." Swaggart, 110 S.Ct. at 697. Under the law as interpreted by the New York State Courts, a tax exempt owner must be given hardship relief if "maintenance of the landmark either physically or financially prevents or seriously interferes with carrying out the charitable purpose." Admin. Code §25-309[a](2)(c); Society for Ethical Culture v. Spatt, 51 N.Y.2d 449,

455, 415 N.E.2d 922, 925 (1980).

This standard, which the Court of Appeals held comported with the First Amendment (A-4), ensures that if a religious owner cannot maintain its activities in its landmark building, it will be given hardship relief. In addition, this standard provides a mechanism for individualized assessment of claims that operation of the law works a hardship on religious grounds. See Employment Division v. Smith, 110 S.Ct. at 1603.

When an owner applies for hardship relief on this ground, the owner describes the functions it uses the building for and the Landmarks Commission defers to the owner's statement. Thus, when petitioner applied for hardship relief the Landmarks Commission asked petitioner what activities it needed to house in the Community House and accepted the stated needs as a given (JA-306). Petitioner was denied hardship

relief only because, as the District Court found (A-42-43), there was no evidence to show that the Community House was unsuitable for all the activities petitioner housed in the building.

As the Court of Appeals held, there is no entanglement difficulty with this inquiry into objective architectural concerns. See Hernandez, 109 S.Ct. at 2147-48; Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 305-06 (1985). A further inquiry into the owner's ability to afford repairs is made only if an owner chooses to argue, as petitioner did, that even if it could fit its activities into the landmark structure, it could not afford to make necessary repairs (A-4). This inquiry accommodates poor religious organizations by allowing them to obtain hardship relief even if a wealthier owner would spend the money to repair the landmark property. Again, this limited inquiry into objective financial

matters does not entangle government with religion, especially because the owner determines the scope of the Commission inquiry.[5] See Swaggart, 110 S.Ct. at 697-99; Lemon v. Kurtzman, 403 U.S. 602, 619 (1971).

The remaining issues raised by the petition were resolved by this Court in Penn Central. This Court has already rejected the claim that Commission decision making is arbitrary, pointing to the availability of judicial review of Commission actions. Penn Central, 438 U.S. at 132-33. This Court has also already considered and rejected the argument that the Landmarks Law is invalid

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[5] The Commission has never interpreted the hardship test as authorizing it to inquire into a religious owner's spending priorities and whether it could afford the repairs by redirecting its priorities. There has been no finding by the lower courts of such an inquiry in the case at bar. While such matters were raised by dissident parishioners, they formed no part of the Commission's decision (JA-820-73).

because regulation depends on aesthetic judgment. Penn Central, 438 U.S. at 132. As in that case, the argument has "a particularly hollow ring" since petitioner never sought judicial review of the designation of the Church and the Community House.

Petitioner's failure to challenge the designation in the many years since 1967 is telling evidence that the Landmarks Law is a neutral law of general applicability that may be validly applied to properties owned by religious organizations. Because the law does not place a substantial burden on religious institutions as owners of landmark properties, it is consistent with the Free Exercise Clause.

POINT TWO

THIS COURT CONSIDERED AND REJECTED IN PENN CENTRAL THE ARGUMENT THAT THE NEW YORK CITY LANDMARKS LAW EFFECTS AN UNCONSTITUTIONAL TAKING OF PROPERTY.

This Court has already upheld the constitutionality of New York City's Landmarks Law as against a takings challenge. Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978). Application of the law to petitioner is surely constitutional.

A law "does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987). The Landmarks Law satisfies the first part of this test; this Court so held in Penn Central, 438 U.S. at 132-34, and it reaffirmed that view in Nollan, 483 U.S. at 834-35.

Petitioner asks this Court to hold that

the Landmarks Law deprives it of "economically viable use of its land" because it limits the Church's unfettered right to exploit its air rights and develop its property. The identical argument was raised and resoundingly rejected by the Penn Central Court: "[T]he submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable." 438 U.S. at 130. See also Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 496-99 (1987) (ban on mining certain coal does not effect a taking).[6]

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[6] This Court also rejected in Penn Central petitioner's claim that landmarks do not enjoy a reciprocity of advantage from the landmarking: "Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures, ... --

(Footnote Continued)

Petitioner's claim that the landmarking deprived it of 80% of the property's value (petition at i, 27) is contradicted by the factual findings below. This figure assumes that petitioner has lost the value of the Community House as a development property, which is untrue. Just as in Penn Central, the Commission did not "prohibit any construction," 438 U.S. at 137. The Commission has expressly stated that it does not consider the Community House "to be inviolate or unalterable" (JA-607) and the Court of Appeals noted that the Commission "invited [petitioner] to propose an addition to the Community House in the instant matter" (A-17). In addition, the Courts below found that like the property owner in Penn Central, petitioner has valuable

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(Footnote Continued)
which we are unwilling to do -- we cannot conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law." 438 U.S. at 134-35.

transferable development rights available for exploitation (A-17, 22, 55-56). Petitioner's claim to the contrary (Petition at 24) was rejected as "unsupported" by the Court of Appeals (A-17).

In addition to petitioner's failure to prove that it had lost development rights retained by the owner in Penn Central, petitioner failed to prove that it was entitled to hardship relief under the New York test for tax exempt buildings adopted by the Courts below. That test is well suited to determining whether a property that was never intended to be profit making has lost economic viability: If the building is no longer suitable for the owner's purposes and the owner cannot house its programs in the building, hardship relief is available (A-4). This standard ensures that the owner will always be able to use its property; the owner will not have to find a replacement building just because its building has been

designated as a landmark.

Because this standard looks to the specific owner's use of the property to measure economic viability, it is easier for the owner of a tax exempt property to obtain hardship relief than it is for owners who are not eligible for relief under this standard. All the tax exempt owner need show is that it cannot house its activities in the landmark structure and the structure cannot reasonably be adapted for the owner's charitable purposes. In the case at bar the District Court found as fact and the Court of Appeals affirmed that petitioner "failed to prove that it is incapable of carrying out its charitable purpose within those facilities" and, therefore, there had been no taking of petitioner's property (A-18, 56).

Finally, there is no merit to petitioner's assertion that the decision below conflicted with the decision of the New York State Court of Appeals in Seawall Associates v.

City of New York, 74 N.Y.2d 92, 542 N.E.2d 1059, cert. denied sub nom. Wilkerson v. Seawall Associates, _ U.S. _, 110 S.Ct. 500 (1989). In its opinion in Seawall the Court of Appeals cited Penn Central with approval and discussed at length the reasons why the law at issue was "unlike that of the Landmarks Law in Penn Central." 74 N.Y.2d at 108-09, 542 N.E.2d at 1066. Moreover, the New York Court of Appeals has rejected a similar challenge to the Landmarks Law, also brought by a religious property owners. Society for Ethical Culture v. Spatt, 51 N.Y.2d 449, 415 N.E.2d 922 (1980). Thus the purported conflict is non-existent in the eyes of the New York Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

February 1, 1991

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